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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 666

WILLIAM F. WORTHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 348-350) is reported at 164 F. 2d 979.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1947 (R. 351), and a petition for rehearing was denied February 12, 1948 (R. 360). The petition for a writ of certiorari was filed March 9, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a confession made by petitioner, a naval officer, to agents of the Federal Bureau of Investigation and naval investigating officers at a time when no charges had been made against him and he was not under arrest was inadmissible under the *McNabb* rule or because it was not given voluntarily.

2. Whether the trial court erred in admitting the confessions of a codefendant, obtained under similar circumstances.

STATEMENT

On February 12, 1946, an indictment was filed in the District Court for the Eastern District of Louisiana charging petitioner and one LaCour with conspiracy to defraud the United States, in violation of 18 U. S. C. 88 (R. 2-15). The conspiracy consisted of an agreement whereby petitioner, who held the rank of commander in the Navy and who had authority to purchase sporting goods for the Navy, would make his purchases from LaCour's firm and then resell a substantial part of the equipment to the firm for cash, which he would convert to his own use after paying small sums to LaCour. After a jury trial, both defendants were found guilty as charged (R. 21, 321). LaCour was sentenced to imprisonment for a year and a day and fined $600, but execution of the sentence was suspended and he was placed on probation for five years (R. 341-343). Petitioner was sentenced to imprisonment for two years and fined $7500 (R. 343-344). LaCour did not appeal. The judgment as to petitioner was affirmed by the circuit court of appeals (R. 351).

The evidence bearing on the issues raised by the petition may be summarized as follows:

After presenting evidence to show that during 1943 and 1944 petitioner bought athletic equipment for the Navy

from LaCour's firm (R. 97, 160-161), that petitioner also sold merchandise to the firm through LaCour, for which he was paid in cash (R. 100-146), and that petitioner deposited large sums in cash in banks during the same period (R. 51-58, 69-72), the Government offered confessions which both LaCour and petitioner had made. Objection was made that the confessions had not been given voluntarily, whereupon the jury was excused and the court heard evidence on the point.

The Government witnesses testified that when they first sought to question LaCour, it was discovered that he had entered the Navy and was undergoing "boot training" at the Naval Training Station, San Diego, California. An F. B. I. agent and a lieutenant of the Office of Naval Intelligence asked permission of LaCour's superior officer to interview him on July 23, 1945. (R. 168-169, 202-204.) At the onset of the interview, the intelligence officer explained to LaCour who they were and why they had called him in; he was told that he did not have to talk to them if he did not wish to do so, that he could have a naval or civilian representative present if he wished, and that any statement he made might be used against him in court (R. 191, 205, 207, 214-215). There were no threats or promises and there was no demand that he answer any question (R. 170-172, 174, 180, 203, 206-207, 250-251). LaCour was at first reluctant to answer questions, but after he realized that the F. B. I. agent already had considerable information about the matter, he made a statement which was reduced to writing and carefully examined by him before he signed it (R. 169-170, 175-176). He made no complaint that he was being forced to make the statement (R. 171-172, 174, 181, 207). LaCour amplified his statement the following day under substantially similar circumstances, except that on this occasion the F. B. I. agent was accompanied by two naval intelligence officers, one of whom did most of the

questioning. Again there were no threats or promises, nor were any answers demanded; LaCour made no protest and his attitude was described as very cooperative. (R. 182-200, 208-217.) LaCour made a third statement on August 11, 1945; as before, he was told that he did not have to make a statement and no demands were made upon him, but he cooperated fully (R. 219-237).

After the Government witnesses had testified as above, LaCour himself took the stand. He testified that he did not attend any of the interviews voluntarily; that he was not advised of his right to counsel; that he volunteered no information and gave none until it was "pumped" from him by repeated questions; that he felt obliged to answer because the naval officers present told him an investigation was being made, though he admitted that the officers said nothing to indicate that he was under orders to answer. He testified that the F. B. I. agent ordered him to answer; then he modified this by saying that the agent suggested that the judge would give him consideration if he answered; still later he returned to the version that his answers were in response to the agent's demands. (R. 237-248.) The agent, recalled by the Government, testified that he may have told LaCour that his experience was that judges are apt to be favorably disposed toward an accused who cooperates (R. 249-251).

In respect of petitioner's confession, the government witnesses testified that the interview which led up to it took place in the presence of two F. B. I. agents and a captain, a lieutenant commander and a lieutenant of naval intelligence (R. 259-260, 270). The captain told petitioner, who, as noted before, was a full commander, that he had been brought there to answer some questions about his income tax (R. 264, 268, 270). He was then told by the others that he did not have to make a statement and that anything he said might be used against him; there were no demands,

threats or promises and petitioner did not complain about making the statement (R. 260, 261, 271-272). The captain remained in the room for about half an hour, but never ordered petitioner to answer questions and took no part in the actual questioning (R. 260, 266-267, 271). Most of petitioner's admissions and the formulation and signing of his confession took place after the captain left the room (R. 261, 269, 271, 272, 275-276). The written statement was examined by petitioner before he signed it (R. 262-263, 273).

Petitioner himself then took the stand and testified that he had been on leave at the time of these events and was called back for the investigation (R. 277-278); that the captain implied that he was expected to answer questions (R. 278-279); and that he did not give the statement voluntarily but because he believed he should carry out the captain's wishes (R. 280, 284-285, 288, 291). He admitted, however, that he knew that under Navy regulations no one could be forced to make a statement incriminating himself (R. 281-283, 290).

After hearing, in turn, the testimony as to the circumstances of the confessions of LaCour and petitioner, the court ruled that they were freely and voluntarily given. In each instance, the jury was then recalled and informed of the court's ruling admitting the confessions as voluntary, and they were also instructed that the statements of one defendant could not be considered against the other unless the jury found that there was a conspiracy and that the statements had been made in furtherance of the conspiracy. (R. 252-256, 292-295.) At the conclusion of this instruction in respect of petitioner's statement, upon exception by defense counsel that the statements were made after the alleged conspiracy had terminated, the court stated that this was for the jury to determine and instructed them that if the statements were in fact made after the termination of

the conspiracy, they could not have been in furtherance of it (R. 294). The statements were then, in turn, read to the jury (R. 256-257, 295). While the confession of each defendant implicates the others, they give substantially similar accounts of the transactions between the two defendants, without descending to details (R. 325-341). At the close of the Government's case both defendants rested without offering any evidence in their own behalf (R. 307).

In its charge to the jury, the court said that, although the jury's recollection of the facts was ultimately controlling, in the final state of the evidence it was clear that the statements were made after the conspiracy had come to an end and were, therefore, not in furtherance of the conspiracy, and that the confession of one defendant could not under such circumstances be binding upon the other (R. 314-315).

ARGUMENT

1. Petitioner contends (Pet. 9, 10-14) that his confession should have been excluded under the rule of *McNabb* v. *United States,* 318 U. S. 332. But that case involved a "flagrant disregard" of the congressional mandate that a person arrested on a charge of crime be taken promptly before a judicial officer for a hearing. 318 U. S. at 345. "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case * * *." *United States* v. *Mitchell,* 322 U. S. 65, 67. Petitioner's situation was not parallel to that of the *McNabb* case defendants, or even to that of Mitchell, for he was not in any manner illegally restrained. He was an officer in the Navy and was ordered by his superiors to report for investigation, but he was immediately told by those who were conducting the

investigation that he did not have to answer any questions or make any statement if he did not desire to do so, and he knew that they had no power to force him to answer incriminating questions. He was not under arrest, and, so far as appears from the record, he could have terminated the interview at any time he chose. We submit that he was neither illegally detained nor subjected to unfair treatment during the questioning.

Petitioner's contention that the confession was not made voluntarily but that he was coerced by the orders of his superiors (Pet. 14) is equally untenable. We think it clear from the testimony summarized in the Statement, *supra,* that, while petitioner was ordered to appear for the investigation, there was abundant evidence to support the trial court's finding that the confession was made freely and voluntarily.

2. Petitioner's final contention (Pet. 15-16) is that the circuit court of appeals erred in holding that since LaCour had not appealed there was no issue before it as to his confession. Petitioner argues that LaCour's confession was involuntary, and that, therefore, its admission constituted reversible error as to petitioner since it implicated him and since the court charged the jury that it was evidence to be considered.

We think this argument is without merit. In the first place, the circuit court of appeals did not say that the issue of LaCour's confession was no longer in the case; the opinion is silent on that point. Furthermore, we think it clear from the evidence set forth in the Statement, *supra,* that the trial court correctly ruled that LaCour's confession was voluntary and not obtained in violation of the rule of the *McNabb* case. Petitioner's reliance upon *Anderson* v.

United States, 318 U. S. 350, is misplaced since in that case there was a clear violation of the *NcNabb* rule.[1]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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April, 1948.

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[1] We note that the court's charge as to the confessions was not exactly correct in view of this Court's decision in *Fiswick* v. *United States,* 329 U. S. 211, 217, for, while the jury were told that the statement of one conspirator can be used against a co-conspirator only when made in furtherance of the conspiracy, and were further told that it was clear from the evidence that the confessions were made after completion of the conspiracy and "could not possibly" have been made in furtherance of it, still the ultimate decision as to the facts was left to the jury (R. 314-315). This point, though once raised by petitioner (R. 295), was ultimately abandoned. Counsel expressed (R. 320-321) his entire satisfaction with the charge (see Rule 30, F. R. Crim. P.), and his only objection to LaCour's confessions, both in the circuit court of appeals and in the present petition, is directed to the issue of compulsion. Furthermore, in the *Fiswick* case, the jury were specifically instructed that the confessions *were* made in furtherance of the conspiracy, whereas here the jury were told that, in the Judge's opinion, it was clear from the evidence that the confessions were *not* in furtherance of the conspiracy. Under the circumstances, and especially in view of the similarity of the confessions in describing the transactions between the two defendants and of petitioner's abandonment of the point, we think it presents no problem. Cf. *Blumenthal* v. *United States,* 332 U. S. 539, 559-560; *Statler* v. *United States,* 164 F. 2d 94 (C. C. A. 5) certiorari denied February 2, 1948, No. 479, this Term.

U. S. GOVERNMENT PRINTING OFFICE, 1948